Supreme Court, U.S.
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No. 97 -

In the Supreme Court of the United States

OCTOBER TERM, 1997

HOWARD MORTEN HARRIS,
Petitioner,

v.

DIANE L. JENSEN
and
BANKERS TRUST COMPANY,
Respondents.

Petition for a Writ Of Certiorari to the
United States District Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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60 pp

QUESTION PRESENTED

Whether the Eleventh Circuit erred by affirming a rule that protects pension benefits from the reach of creditors, only if the reviewing court determines that the pension plan has always been administered in absolute compliance with ERISA and the Internal Revenue Code--even though the pension plan is covered by ERISA and contains the anti-alienation provision that this Court held protected pension benefits in Patterson v. Shumate, 504 U.S. 753 (1992).

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1(b), petitioner states that all parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

INTRODUCTION AND STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 6

CONCLUSION 16

APPENDIX A1

Opinion of the United States Court of Appeals for the Eleventh Circuit A1

Opinion of the United States District Court for the Middle District of Florida, Tampa Division. A3

United States Bankruptcy Court Middle District of Florida, Tampa Division A5

Exhibit "A" - "Uncontested Facts" A28

TABLE OF AUTHORITIES

FEDERAL CASES

In re Baker, 114 F.3d 636 (7th Cir. 1997) 8, 14, 15

In re Craig, 204 Bankr. 756 (D.N.D. 1997) 15

Daniel v. Security Pacific National Bank (In re Daniel), 771 F.2d 1352 (9th Cir. 1985), cert. denied, 475 U.S. 1016 (1986) 7, 12

Guidry v. Sheet Metal Workers National Pension Fund, 493 U.S. 365 (1990) -- 3, 15

In re Harris, 144 Bankr. 444 (M.D. Fla. 1995) 10

Intermodal Rail Employees Associate v. A,T&SF Railway Co., __ U.S. __ 10

Patterson v. Shumate, 504 U.S. 753 (1992) . . . . . *passim*

In re Reed, 951 F.2d 1046 (9th Cir. 1991), cert. granted, vacating and remanding in light of Patterson, 506 U.S. 910 (1992) 8, 12, 13, 14

FEDERAL STATUTES

28 U.S.C. § 1254(1) 2

11 U.S.C. § 514(c)(2) 2

11 U.S.C. § 541(c)(2) 2

29 U.S.C. § 1002(2)(A), ... 5, 9

29 U.S.C. §1002(7) 18

29 U.S.C. §1002(2)(A) 19

29 U.S.C. § 1106 13

29 U.S.C. § 1109 and 1132(l) 10

29 U.S.C. § 1056(d)(1), ... *passim*

29 U.S.C. § 1103(c)(1) 18

26 U.S.C. § 72(p) 13

26 U.S.C. § 401(a)(13) 5

26 U.S.C. § 4975 . . . . . 10, 12, 13

26 U.S.C. § 401 14

26 U.S.C. § 401(a)(13) 2

29 U.S.C. § 1003 . . . . . 3, 10

FEDERAL REGULATIONS AND OTHER PRONOUNCEMENTS

29 C.F.R. § 2510.3-3(b) 5, 18, 19

Rev. Proc. 92-89, 1992-2 C.B. 498 4

Rev. Proc. 94-16, 1994-1 C.B. 576 4

STATE STATUTES

Fla. Stat. §222.06 6

Fla. Stat. §222.20 . . . . . 23, 25

Fla. Stat. §222.21 . . . . . 5, 21, 22

Fla. Stat. §222.201 . . . . . 5, 7, 23, 24

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DIANE L. JENSEN
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Petition for a Writ Of Certiorari to the
United States District Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Howard Morton Harris respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* A1) and the opinion of the district court (App., *infra,* A3-A4) are not reported. The opinion of the bankruptcy court (App, *infra,* A5-A27), is reported at 188 Bankr. 444 (M.D. Fla. 1995).

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1997. App., *infra,* A1-A2. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Bankruptcy Code § 514(c)(2), 11 U.S.C. § 514(c)(2), provides that "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title."

Employee Retirement Income Security Act § 206(d)(1), 29 U.S.C. § 1056(d)(1), provides that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated."

Internal Revenue Code § 401(a)(13), 26 U.S.C. § 401(a)(13), provides that "[a] trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated."

INTRODUCTION AND STATEMENT OF THE CASE

The Eleventh Circuit has determined that a bankruptcy debtor is not entitled to exclude his pension benefits from his bankruptcy estate under Bankruptcy Code § 541(c)(2), 11 U.S.C. § 541(c)(2), even though the pension benefits are payable from a pension plan covered by Title I of the Employee Retirement Income Security Act ("ERISA") and even though the plan contains the anti-alienation provision

found by this Court in Patterson to protect pension benefits from creditors.

In this case, the Eleventh Circuit affirmed without opinion two lower court decisions holding that the Patterson protection for pension benefits is only available if the pension plan from which the benefits are paid has always been administered in complete compliance with Title I of ERISA, 29 U.S.C. §§ 1001-1194, and the Internal Revenue Code ("I.R.C.")

The Eleventh Circuit's decision conflicts with Patterson, and with decisions in the Seventh and Ninth Circuits and numerous lower federal courts addressing the same question. In this case, the Eleventh Circuit approved the decision of a bankruptcy court that departs from the rule of law set forth in Patterson and in Guidry v. Sheet Metal Workers National Pension Fund, 493 U.S. 365 (1990)--that pension benefits under ERISA-governed plans which contain the anti-alienation provision required for ERISA qualification are to be excluded from the bankruptcy estate under § 541(c)(2) of the Bankruptcy Code.

The refusal to protect the pension benefits in this case also represents an unwarranted departure from the plain language of ERISA §206(d)(1), 29 U.S.C. § 1056(d)(1), which expressly provides protection from alienation for pension benefits under "each pension plan." Coverage under ERISA exists expressly because a plan is a "pension plan," not because it is pension plan that is one hundred percent in compliance. See ERISA § 4, 29 U.S.C. § 1003 (defining the term "pension plan").

The Eleventh Circuit's decision is also at odds with the approach to noncompliance taken by the Internal Revenue

Service. The IRS has voiced its concern that numerous complex statutory and regulatory changes have decreased the likelihood that pension plans can be administered without error See Rev. Proc. 94-16, 1994-1 C.B. 576; Rev. Proc. 92-89, 1992-2 C.B. 498; Pens. Plan Guide (CCH) at ¶6205. The IRS's response has been to develop voluntary compliance programs which allow pension plans to retain their tax-qualified status and protect pension benefits, in the face of noncompliance. Id. (discussing the Closing Agreement Program and the Voluntary Compliance Resolution Program). Contrary to the response of the regulatory agency charged with determining the tax-qualified status of pension plans, the Eleventh Circuit's response has been to alienate pension benefits unless there has always been total compliance with the Tax Code and ERISA.

Unless this Court grants review of the decision in this case, pension benefits held in plans that fall out of compliance with ERISA and the I.R.C. will not be safe from the reach of creditors. The express dictates of ERISA and the significant precedential value of Patterson to protect pension benefits will be substantially eroded if the Eleventh Circuit decision is sustained.

1. Petitioner, Dr. Howard Morton Harris ("Dr. Harris"), sought to exclude his retirement benefits from his Chapter 7 bankruptcy estate, pursuant to Bankruptcy Code § 541(c)(2). Bankruptcy Trustee Diane Jensen and Bankers Trust Company objected to the exclusion on the grounds that the profit sharing plan in which Dr. Harris has his retirement benefits is not an ERISA-qualified plan.

2. Dr. Harris' pension benefits are provided under a profit sharing plan, which is a pension plan within the

meaning of ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A)[1] and which contains a provision prohibiting participants from assigning or alienating their pension benefits, as required by ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1), and I.R.C. § 401(a)(13). Exhibit A *infra*, A28 at ¶ 9.

3. Although this Court has held that the anti-alienation provision required for ERISA qualification constitutes an enforceable transfer restriction for purposes of Bankruptcy Code § 541(c)(2)'s exclusion of property from the bankruptcy estate, Patterson, 504 U.S. at 760, the bankruptcy court ruled that Dr. Harris' benefits were not protected from the reach of his creditors. The bankruptcy court allowed Dr. Harris' pension benefits to be alienated, because the court ruled that the profit sharing plan in which Dr. Harris has his retirement benefits is not an "ERISA-qualified pension plan." In so holding, the bankruptcy court admittedly created its own definition of "ERISA-qualified pension plan" to mean a plan that is operated in complete compliance with ERISA and the I.R.C. Because the bankruptcy court found that Dr. Harris' pension benefits are provided from a pension plan that was not one hundred percent in compliance with ERISA, the court ruled that Dr. Harris's retirement benefits were not entitled to be excluded from his bankruptcy estate under § 541(c)(2) of the Bankruptcy Code. App., *infra*, A5. The ruling of the court made Dr. Harris' pension benefits available to his creditors.

4. The United States District Court for the Middle District of Florida affirmed the decision of the bankruptcy court, noting its agreement with the bankruptcy court's interpretation of Patterson, its disregard of other

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[1]See 29 C.F.R. § 2510.3-3(b).

circuit precedent and its substantive evaluation of ERISA and the meaning of ERISA-qualified pension plan. App., *infra,* A3.

5. The Eleventh Circuit affirmed, without opinion, the decision of the United States District Court for the Middle District of Florida. App., *infra,* A1.

The Eleventh Circuit's decision warrants review, because it involves an important issue of federal law that should be resolved by this Court--whether there should be uniformity in the protection of pension benefits payable from pension plans that are regulated under ERISA.

REASONS FOR GRANTING THE PETITION

THE RULING BELOW IS INCONSISTENT WITH THE RULINGS OF THIS COURT

This Court in Patterson held that "applicable nonbankruptcy law" for purposes of §541(c)(2) of the Bankruptcy Code includes ERISA, and that the anti-alienation provision required for ERISA qualification constitutes an enforceable transfer restriction for purposes of § 541(c)(2)'s exclusion of property from the bankruptcy estate. Patterson, 504 U.S. at 760. In its decision in Patterson, this Court wrote:

> we granted certiorari to resolve the conflict among the Courts of Appeals as to whether an anti-alienation provision in an ERISA-qualified pension plan constitutes a restriction on transfer enforceable under "applicable nonbankruptcy law" for purposes of the § 541(c)(2) exclusion of property from the

debtor's bankruptcy estate.

Patterson, 504 U.S. at 757.

At the end of the quotation set forth above, this Court listed those cases involving **"ERISA-qualified pension plans"** that had resulted in the split in the Circuits and review by this Court. The cases listed include those cases protecting benefits in ERISA qualified plans and those that improperly alienated pension benefits. Patterson, 504 U.S. at 757 at n.1. A number of the plans at issue in the cases cited by this Court as involving "ERISA-qualified pension plans" were not administered in full compliance with ERISA and the I.R.C.[2] Nevertheless, this Court acknowledged that such plans were "ERISA-qualified pension plans."

In Patterson, this Court did not create a new definition of the term "ERISA-qualified pension plan." It simply applied the term as it had been applied as Patterson wended its way from the bankruptcy court through the Fourth Circuit and as the term had been applied in the dozens of cases preceding the decision in Patterson: A plan covered by ERISA containing the ERISA required anti-alienation provision is an ERISA-qualified pension plan. The Eleventh Circuit's decision to give Dr. Harris's pension benefits to his creditors is an affirmance of the bankruptcy court's definition of the

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[2] For example, this Court cited Daniel v. Security Pacific Nat. Bank (In re Daniel), 771 F.2d 1352 (9th Cir. 1985), cert. denied, 475 U.S. 1016 (1986) as a case in which the plain language of the statute which should have protected the pension benefits was ignored. Patterson, n.2. In Daniel, the debtor had administered his plan contrary to ERISA and the I.R.C. by taking excessive loans from the plan; the debtor had also utilized the plan to hide otherwise non-exempt assets from creditors, 771 F.2d at 1357.

term "ERISA-qualified pension plan," to mean only a plan that is absolutely in compliance in operation and form with every applicable section of ERISA and the I.R.C.

In reaching its decision in Patterson that pension benefits under ERISA-qualified pension plans are protected, this Court considered whether the plan at issue was covered by ERISA and whether the plan contained the anti-alienation clause required by ERISA §206(d)(1), 29 U.S.C. § 1056(d)(1). Nowhere does this Court state in Patterson that only plans that are in full compliance with ERISA and the I.R.C. are entitled to the protection of ERISA's anti-alienation clause.

The rulings by the lower courts in the instant case, however, are contrary to Patterson and, as discussed later, conflict with the Seventh and Ninth Circuit opinions addressing the same question. In re Baker, 114 F.3d 636, 640 (7th Cir. 1997); In re Reed, 951 F.2d 1046 (9th Cir. 1991), cert. granted, vacating and remanding in light of Patterson, 506 U.S. 910 (1992). The Eleventh Circuit would protect pension benefits only if the pension plan paying the benefits has always been administered in complete compliance with Title I of ERISA and the I.R.C.

The Eleventh Circuit's refusal to protect Dr. Harris' pension benefits and the definition of "ERISA-qualified pension plan--coined in this case by the bankruptcy court and affirmed by the district court and the court of appeals--is inconsistent with the protection of pension benefits and the use of the term "ERISA-qualified" by the federal courts, including this Court in Patterson. The definition of "ERISA-qualified pension plan" in this case strips away the protection this Court has afforded pension benefits in Patterson and Guidry.

The refusal to protect the pension benefits in this case also represents an unwarranted departure from the plain language of ERISA §206(d)(1), 29 U.S.C. § 1056(d)(1), which expressly provides protection from alienation for pension benefits under "each pension plan." The term "pension plan" is defined under ERISA § 3(2)(A), 29 U.S.C. §1002(2)(A), as,

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program
>
> (i) provides retirement income to employees,or
>
> (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

Nothing in this definition requires that the "pension plan" always be administered in compliance with ERISA in order to be subject to ERISA's anti-alienation protection. Coverage under ERISA exists expressly because a plan is a "pension plan," not because it is a pension plan that is one hundred percent in compliance. See ERISA § 4, 29 U.S.C. § 1003.

Moreover, Congress chose to impose specific sanctions for the failure to administer a plan in compliance with Title I of ERISA or the Internal Revenue Code. See, e.g., ERISA §§ 409 and 502(l), 29 U.S.C. § 1109 and 1132(l), and I.R.C. § 4975 (imposing liability and penalties for breaches of fiduciary duty and prohibited transactions). Congress did not choose to punish noncompliance by making pension benefits available to retirees' creditors. However, that punishment is now available in the Eleventh Circuit, even though this Court holds that the remedies under ERISA are not to be expanded beyond the express dictates of that statute. Mertens v. Hewitt Associates, 508 U.S. 248 (1993).

This Court in Patterson reiterated that statutory language should be applied as it is written, not as it might have been written. Recently, in applying the provisions of ERISA, this Court has underscored that rule of statutory construction. Intermodal Rail Employees Assoc. v. A. T&SF Railway Co., __ U.S. __, No. 96-491 (1997). In the instant case, the courts below have ignored this rule.

THE RULING BELOW CONFLICTS WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS

The bankruptcy court in In re Harris, 144 Bankr. 444 (M.D. Fla. 1995), acknowledged that this Court in Patterson had held that the anti-alienation provision required for ERISA-qualification of a profit sharing plan constituted an enforceable transfer restriction for purposes of Bankruptcy Code § 541(c)(2). App., *infra*, A13-A14.

Since the pension plan at issue contained the anti-alienation provision required by ERISA § 206(d)(1), Patterson and § 206(d)(1) should have controlled, and Dr.

Harris's retirement benefits in his ERISA-covered pension plan should have been excluded from his bankruptcy estate under Bankruptcy Code § 541(c)(2). However, rather than applying Patterson and § 206(d)(1) and protecting Dr. Harris' pension benefits, the bankruptcy court ignored the express language of ERISA, which makes ERISA § 206(d)(1) applicable to "[e]ach pension plan," as the term "pension plan" is defined under ERISA § 3(2)(A). Having ignored the language of the statute, the court then sidestepped Patterson and coined a new definition of the term "ERISA-qualified pension plan." The bankruptcy court held that as a matter of law an "ERISA-qualified plan" meant only a plan that is

> operated in full requirement of ERISA and also the Internal Revenue Code. While the Bankruptcy Court is not competent to determine whether or not the ERISA-qualification should be revoked or terminated for non-compliance for purposes of the Internal Revenue Code, it is certainly competent to determine whether or not the Plan under consideration is within the holding of Patterson.

App., *infra,* A17-A18. The bankruptcy court then concluded that, because the plan at issue had not been operated in complete compliance with ERISA and the I.R.C., the plan was not within the holding of this Court in Patterson, and thus, Dr. Harris's interest in the plan could be included in his bankruptcy estate. App., *infra,* A20-A21.

The decision of the bankruptcy court--affirmed by the district court and the Eleventh Circuit--requiring complete compliance with ERISA and the I.R.C. is contrary to this Court's decision in Patterson. It is also in conflict with

decisions involving "ERISA-qualified pension plans" referred to by the Supreme Court in footnotes 1 and 4 of Patterson, 504 U.S. at 757. These pre-Patterson decisions include cases involving ERISA-qualified plans that were not in full compliance with ERISA and the I.R.C. See, *supra* n.2; and e.g., Daniel v. Security Pacific Nat. Bank (In re Daniel), 771 F.2d 1352 (9th Cir. 1985), cert. denied, 475 U.S. 1016 (1986).[3]

Shortly after Patterson was decided, this Court granted a petition for a writ of certiorari to the U.S. Court of Appeals for the Ninth Circuit in the case of Reed v. Drummond (In re Reed), 506 U.S. 910 (1992), in which the Ninth Circuit had alienated the pension benefits under an ERISA-qualified pension plan, 951 F.2d 1046 (9th Cir. 1991). In Reed, the Ninth Circuit had written:

> Chapter 7 debtor Eldon S. Reed seeks to exclude his **ERISA qualified pension plan** from his bankruptcy estate. . . Reed's situation resembles the facts before the Bankruptcy Appellate Panel in Kaplan. Kaplan involved a debtor physician employed by his own medical corporation and who acted as beneficiary, named trustee, and administrator of its ERISA qualified pension plan. . . Like Kaplan, Reed, as the sole shareholder of his

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[3]In referring to the Daniel case as one that involved "an ERISA-qualified plan," this Court could not have defined the expression **ERISA qualified-pension plan** to mean a plan in full compliance with ERISA and the Internal Revenue Code, since the debtor/participant had taken an unsecured personal loan which constitutes a prohibited transaction under ERISA § 406 and subjects the perpetrator to an excise tax under I.R.C. § 4975.

> professional corporation, is actually self-employed and in fact exercises unrestricted control over the funds. We note in particular that Reed took an unsecured personal loan of over $100,000 from the plan (which has not been repaid); this indicates that Reed controls the funds as well as demonstrates that the pension is not sufficiently restricted to qualify as a spendthrift trust. . . . In sum, we hold that Reed cannot shield his pension plan assets from his bankruptcy estate. We find that . . . ERISA does not qualify as "applicable nonbankruptcy law" under that provision, and because Reed's **ERISA qualified pension plan** does not constitute a valid spendthrift trust.

Reed, 951 F.2d 1046, 1047-1050 (9th Cir. 1991)(emphasis supplied).

The loan taken in Reed was clearly in excess of the limitations set under I.R.C. § 72(p) and was a prohibited transaction under ERISA § 406, 29 U.S.C. § 1106, and I.R.C. § 4975.[4] Neither this Court nor the Ninth Circuit on remand

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[4]A pension plan does not cease to be qualified under the Internal Revenue Code due to prohibited transactions:

> [O]perational matters that result in excise tax or additional income tax rather than plan disqualification, because the statutes already provide specific tailored sanctions for those defects [include f]or example, funding deficiencies (failures to make the required contributions to a plan subject to section 412), **prohibited transactions**, and failures to file the Form

concluded that the rule in Patterson did not apply, because the plan was not in compliance with the I.R.C. and Title I of ERISA. To the contrary, this Court vacated and remanded the case in light of Patterson. The Ninth Circuit reversed and ruled that the pension benefits had to be protected from the reach of creditors, Reed, 985 F.2d 1026 (9th Cir. 1993). Thus, the Eleventh Circuit's affirmance in the instant case conflicts with the decision in Reed.

Similarly, the Eleventh Circuit's affirmance conflicts with In re Baker, 114 F.3d 636 (7th Cir. 1997), in which the Seventh Circuit addressed the issue of whether a bankruptcy debtor's failure to follow the terms of his "ERISA-qualified" pension plan regarding plan loans removed the debtor's pension benefits from ERISA's anti-alienation protection and, therefore, made his pension benefits available to satisfy the claims of his creditors.

The Seventh Circuit held that because the pension plan was an ERISA covered plan that contained the anti-alienation clause required by § 206(d)(1) of ERISA, the plan was an "ERISA-qualified" plan and the debtor's pension benefits under the plan were entitled to protection under ERISA and the exclusion from his bankruptcy estate under § 541(c)(2) of the Bankruptcy Code, pursuant to this Court's decision in Patterson. In re Baker, 114 F.2d at 638-40.

The Seventh Circuit stressed that the debtor's failures to administer the plan in compliance with ERISA and the I.R.C. subjected the debtor to taxes and other penalties, but

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5500 . . .

Rev. Proc. 94-62, §4(.05), 1994-39 I.R.B. 11.

that such

> violations of ERISA do not make ERISA inapplicable, if extensive violations of a federal law made that law go away, the rules would be chimerical. ERISA applied, and was violated; for purposes of Patterson, what matters is the application of ERISA's subchapter I, rather than observance of its rules. . . Inequitable or not, however, the anti-alienation clause governs. There is no "equity" exception to §1056(d)(1) of ERISA, or §541(c)(2) of the Bankruptcy Code. Guidry v. Sheet Metal Workers National Pension Fund, 493 U.S. 365 (1990).

In re Baker, 114 F.3d 636, 640 (7th Cir. 1997); see also In re Craig, 204 Bankr. 756 (D.N.D. 1997)(thoroughly reviewing the disparate case law that is developing in the lower federal courts on the issue of whether or not a plan must be in complete compliance with ERISA and the I.R.C. in order for ERISA's protection against alienation of benefits to apply).

There is clearly a conflict within and among the Circuits on the scope of ERISA's protection of pension benefits from creditor alienation and the application of this Court's rulings in Patterson and Guidry. Given the more than $2 trillion invested in pension plans and the aging of Americans, surely, the scope and uniformity of the ERISA protection of pension benefits--rather than a patchwork protection depending upon the lines drawn between circuit court jurisdictions--is worthy of consideration by this Court.

CONCLUSION

Based on the foregoing, we respectfully request that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 1997

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT

No. 96-2808

D.C. Docket No. 95-1858-civ-T-23E
Bankruptcy No. 94-7386-9P7

IN RE: HOWARD MORTEN HARRIS,

Debtor.

HOWARD MORTEN HARRIS,

Petitioner,

versus

DIANE L. JENSEN,
BANKERS TRUST COMPANY,

Respondents.

Appeal from the United States District Court
for the Middle District of Florida

This CAUSE having been heard and considered, it is
ORDERED AND ADJUDGED: **AFFIRMED**

ENTERED BY ORDER OF THE COURT
DATED: JUNE 6, 1997

/s/ Miguel J. Cortez
Miguel J. Cortez, Clerk

ISSUED AS MANDATE: JULY 8, 1997

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN RE:

HOWARD M. HARRIS, BANK NO. 94-07386-9P7

Debtor.
_____/

HOWARD MORTON HARRIS,

Appellant,

v. CASE NO. 95-1858-CIV-T-23E

DIANE JENSEN, Trustee,

Appellee.
_____/

ORDER

For the reasons expounded by Judge Paskay, the order of September 27, 1995, is **AFFIRMED**.

I note especially my agreement with (1) the bankruptcy court's interpretation of Patterson v. Shumate, 112 S. Ct. 2242 (1992); (2) his evaluation of the merely persuasive precedential value of In the Matter of William

Youngblood, 29 F.3d 225 (5th Cir. 1994); and (3) his substantive evaluation of ERISA. The essential justice of the result in this case is established by Judge Paskay's observation:

> While the Bankruptcy Court is not competent to determine whether or not the ERISA-qualification should be revoked or terminated for non-compliance for purposes of the Internal Revenue Code, it is certainly competent to determine whether or not the Plan under consideration is within the holding of Patterson and excluded from the Debtor's estate by virtue of §541(c)(2). It is beyond peradventure that Profit Sharing plans must be administered for the exclusive benefit of plan participants and not for the benefit of owners of the plan or sponsors who are using the plan as a personal bank. It would be incongruous indeed to grant this protective status to a Profit Sharing plan which is administered as a handy cash cow for the owner and the settlor of the plan.

ORDERED in Tampa, Florida, on May 29th, 1996

/s/ Steven D. Merryday
Steven D. Merryday
United States District Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re: Case No. 94-7386-9P7

HOWARD MORTEN HARRIS

Debtor

ORDER ON MOTION FOR SUMMARY JUDGMENT

In this Chapter 7 liquidation case, Howard Morten Harris (Debtor) claimed as exempt his interest in Howard M. Harris, M.D., P.A. Profit Sharing Plan (Plan). On October 6, 1994, Bankers Trust Company, as Trustee for Marine Contract Corporation, Marine Contract Trust (Bankers Trust), challenged the Debtor's claim of exemption on the grounds that the Profit Sharing Plan is not an ERISA-qualified Plan and, in any event, the claim as asserted did not comply with requirements of Fla. Stat. § 222.21. In addition, Bankers Trust contended that the Debtor's reliance on the Florida Statute cannot be recognized because the "Florida Statutes are unconstitutional" (sic). On October 6th, Bankers Trust amended its Objection and challenged the claimed exemption on the additional grounds that "the Profit Sharing Plan is not a Plan eligible under the Debtor's claimed exemptions which

include Fla. Stat. §222.201; Fla. Stat. §222.21; 29 USC §§ 1056 and 1065 and Spend Thrift Trust."

On October 24, 1994, Diane L. Jensen (Trustee) also filed an Objection to the Debtor's claim of exemptions and in addition to the grounds urged by Bankers Trust contends that the exemptions were not claimed in conformity with the requirements of Fla. Stat. §222.06; and that the claimed exemptions in the personal property exceeded the maximum which could be claimed under the Statute.

On October 27, 1994, this Court directed the Debtor to respond to both Objections. On November 7, 1994, the Debtor filed his Response to the Trustee's Objection and while he consented to the Trustee's Objection and while he consented to the Trustee's Objection concerning his claim of exemption of the personal property, stated that he was unable to respond to the Trustee's Objection concerning the interest in the Profit Sharing Plan. On December 1, 1994, the Debtor also filed his response to the Objection filed by Bankers Trust and stated the same.

On April 28, 1995, the Trustee filed her Motion for Summary Judgment directed to the claim of exemption in the Profit Sharing Plan, contending that there are no genuine issues of material fact and she is entitled, based on the undisputed facts, to a judgment in her favor as a matter of law. On June 8, 1995, Bankers Trust filed its Notice of

Joining in the Motion for Summary Judgment filed by the "United States Trustee" (sic). It should be noted that Ms. Jensen is not the United States Trustee but a member of the official Trustee panel established by the United States Trustee. On May 5, 1995, the Debtor also filed his Motion for Summary Judgment conceding for the purpose of his Motion that there are indeed no genuine issues of material fact but that this is the extent of the concession and, of course, he contends that he is entitled to judgment in his favor as a matter of law.

The Trustee, Bankers Trust, and the Debtor filed a joint Stipulation setting forth the facts which are without dispute, which was attached to the Trustee's Motion for Summary Judgment as Exhibit A. The Stipulation contains 59 separate facts which are not in dispute. Due to the length of the Stipulation which contains several undisputed facts which are redundant and not really relevant, it would not be helpful to recite here all the undisputed facts verbatim. Rather, this Court is satisfied that a summary of the facts by categories agreed upon by the parties should be sufficient. Nevertheless, the entire Stipulation will be incorporated by reference and deemed to be part of this Court's consideration of the Motions for Summary Judgment.

UNCONTESTED GENERAL FACTS

It is stipulated that the Debtor claimed his interest in the Howard M. Harris, M.D.P.A. Profit Sharing Plan (the Plan) pursuant to Fla. Stat. §§222.201, 222.21 and 29 USC §§1056 and 1065; that the Trustee timely filed an Objection to the claim of exemption; that the Debtor is the sole shareholder of the P.A.; that until May 1994, or one month before the Debtor filed his Voluntary Petition, he was a co-trustee of the Plan with his wife Carol (Ms. Harris), who is now the sole trustee of the Plan; that Ms. Harris was at one time an employee of the P.A. In addition, the parties also agreed that the Plan was maintained pursuant to an Adoption Agreement and Prototype Trust Agreement, which received a favorable Letter of Determination from the Internal Revenue Service which stated, however, that the Letter was not a ruling or determination that the Plan per se qualified under §401(a) of the Internal Revenue Code; that the Plan had never been examined or audited for operational compliance with the applicable provisions of the Internal Revenue Code. Lastly, it is agreed that the P.A. ceased doing business in February, 1991.

PLAN INVESTMENTS

The Parties stipulated that substantially all assets of the Plan were invested in undeveloped land, the investments

were made via land trusts or limited partnerships and all assets were not liquid or readily transferable. It is further stipulated that the Debtor had no experience in land investments and did not seek any independent professional advice concerning investment decisions; that with regard to valuing the Plan assets, there are not appraisals of the properties and the distribution to former Plan participants were made on the account balance, based on guesstimates; that the Plan incurred liabilities in connection with these investments and because the Plan had no ready funds it had to borrow funds to meet the costs of maintenance and operating expenses of the Trust assets and to pay the continuing obligations incurred in connection with the acquisitions of the Plan assets. Lastly, it is agreed that the Plan purchased a diamond ring from a member of the Debtor's family; that the diamond ring is no longer available; that the Debtor has no documentation to establish that it was sold and no accounting of the funds claimed to have been obtained from the alleged sale; and while the Plan authorized the purchase of life insurance on the lives of the Plan participants, the only life insurance that was ever purchased was on the life of the Debtor.

PLAN LOANS

It is agreed and stipulated that between 1986 and 1990

the Debtor borrowed more than $125,000 from the Plan; that none of these loans are evidenced by documentation which were either notarized or witnessed; that between 1990 and 1991 the Debtor borrowed from the Plan more than $91,000; that the Debtor has not repaid any of these loans and the Plan has not taken any action to enforce the Promissory Notes executed by the Debtor in connection with these loans, and only the Debtor obtained loans from the Plan. It is stipulated also that the Plan only authorized loans to participants up to $50,000.

PLAN DISTRIBUTIONS - IN GENERAL

It is also stipulated that when the P.A. ceased doing business, it had six employees, four of whose interest in the Plan was vested. However, they did not receive distribution at that time because the Plan had no funds to distribute due to the fact that all available funds were loaned to the Debtor, and the distribution made to the Debtor. In addition, it is stipulated that after the distribution to the Plan participants in 1993 only the Debtor and one other person remained participants of the Plan; that for the purpose of distribution the Plan assets were valued lower than they were valued on the Financial Statements of the Plan. (See ¶ 44 of the Stipulated Facts).

PLAN DISTRIBUTIONS TO THE DEBTOR

It is stipulated that the Debtor received the following distributions from the Plan:

1991	$59,001.00
1992	$59,342.00

These sums were received by the Debtor in addition to the funds he obtained from the Plan; that in April 1991 the Debtor twice received funds from the Plan which totaled $31,000. These transactions were not documented until eight months after the Debtor received these funds. It is also agreed that in November, 1992, the Plan paid the Debtor's legal expenses, which payment was attempted to be justified 10 months later as a "distribution."

DISTRIBUTION TO CAROL HARRIS

It is stipulated that Ms. Harris terminated her employment with the P.A. in 1989, at which time her interest in the Plan was 100% vested with an account balance of $68,368. It is further stipulated that at the time she made her election to receive distribution, she had already received four distributions totaling $68,377.25; that out of this total the sum of $22,839.75 was used to make a down payment on the purchase of a condominium unit in which the Plan had an interest. This down payment was "deemed" to have been charged against the interests in the Plan even though at that

time she had yet to make her election to receive distribution. She also received an additional distribution of $5,594.44 when the Plan-owned life insurance policy on her life was cashed in. Lastly, on December 13, 1988, the Plan was amended to prohibit lump-sum distributions to Plan participants, which amendment became effective January 1, 1989, at the time Ms. Harris received her distribution.

LEGAL ANALYSIS

These are the stipulated facts upon which both the Debtor and the Objectors contend that the Debtor's right to immunize his interest in the Plan could be resolved as a matter of law, of course in their respective favors.

It should be noted at the outset that although the issues are presented in the form of Objections to the exemption claim of the Debtor, the real and the threshold issue is whether or not the Debtor's interest in the Plan is property of the estate subject to administration by the Trustee. The question of whether this property is exempt is a secondary issue and only comes into play if it is determined that the Debtor's interest is property of the estate. This is so because it cannot be gainsaid that only property which is property of the estate can be claimed as exempt. This is clear from the express language of the Code which provides in §522 (b) that "an individual debtor may exempt from property of the estate (emphasis supplied)... the exemption

provided for by the Code." Owen v. Owen, 500 U.S. 305 (1991); In re Sirois, 144, B.R. 12, 14 (Bankr. D. Mass. 1992). So, it is clear that the analysis must begin with a determination of whether the Debtor's interest in the Plan is property of the estate.

Section 541 of the Bankruptcy Code governs the classification of property of the estate. Notwithstanding the broad definition of the term "property of the estate" in §541, subparagraph (c)(2) specifically excludes from the estate, a beneficial interest in a trust which the debtor is restricted from transferring under applicable non-bankruptcy law. Therefore, if the debtor's interest satisfies this exception, the interest in the Plan is excluded from the estate.

Shortly after the enactment of the Code, courts had difficulty in interpreting the term "applicable non-bankruptcy law." Several courts concluded that the anti-alienation provisions in ERISA-qualified Profit Sharing plans constituted a restriction on transfers enforceable under "applicable non-bankruptcy law." Accordingly, a beneficial interest in an ERISA-qualified Plan was held by these courts to be not property of the estate and, thus, not subject to administration by the trustee. In re Harline, 920 F.2d 669 (10th Cir. 1991); cert. pending, No. 91-1412; Velis v. Kardanis, 949 F.2d 78 (3d Cir. 1991); Shumate v. Patterson, 943 F.2d 362 (4th Cir. 1991); In re Lucas, 924 F.2d 597 (6th

Circ.) cert. denied ____ U.S. ____, ____ S. Ct. 2275, 114 L.Ed.2d 726 (1991); In re Moore, 907 F.2d 1476 (4th Cir. 1990).

Other courts have arrived at a contrary conclusion, In re Dyke, 943 F.2d 1435 (5th Cir. 1991); In re Daniel, 771 F.2d 1352 (9th Cir. 1985), cert. denied, 475 U.S. 1016, 106 S. Ct. 1199, 89 L.Ed.2d 313 (1986); In re Lichstrahl, 750 F. 2d 1488 (11th Cir. 1985); In re Graham, 726 F.2d 1268 (8th Cir. 1984); In re Goff, 706 F.2d 574 (5th Cir. 1983).

Because of this conflict between the Circuits, the Supreme Court granted certiorari in Shumate v. Patterson, *supra*, and handed down its decision on June 15, 1992, Patterson v. Schumate ____ U.S. ____, 112 S.Ct 2242, 119 L.Ed.2d 519 (1992) and held that (1) "applicable non-bankruptcy law," for purposes of §541(c)(2), was not limited to state law and included ERISA and other federal law; (2) the anti-alienation provision required for ERISA-qualification of Profit Sharing plan constituted an enforceable transfer restriction for purposes of such Bankruptcy Code provision; and (3) this interpretation of §541(c)(2) was consistent with public policy underlying ERISA.

In this connection it is important to point out what the Supreme Court decided and what it did not. In Patterson, the only issue before the Court was whether or not the term "applicable non-bankruptcy law," as used in §541(c)(2), was

limited to the conventional common law spendthrift trust or also included all plans set up pursuant to Federal legislation requiring anti-alienation provisions, or other restrictions on transfer of the interest of the beneficiary, i.e., ERISA-qualified Plans, which was the Plan involved in Patterson. However, the Supreme Court was not presented with the questions before this Court, and the Court did not deal with them. These are: whether a Plan which facially is an ERISA-qualified Plan, but which is not operated in conformity with the operational requirements of the tax exemption provision of the Internal Revenue Code, 26 U.S.C. §401, would come within the term "applicable non-bankruptcy law;" and whether the fact that the Plan obtained a tax exempt status from the IRS is a conclusive determination of ERISA qualification and therefore, the Bankruptcy Court must defer to the IRS determination that the Plan is ERISA-qualified when considering whether the Debtor's interest in the Plan is exempt.

The Fifth Circuit in In the Matter of William Youngblood, 29 F.3d 225 (5th Cir. 1994) considered whether the bankruptcy court was precluded from making a determination of the qualified status of the plan where the IRS had already made a determination that the plan was qualified. Based upon the recognition that the IRS is entrusted with the task of implementing the Internal Revenue

Code and has a wealth of experience in the application of these laws, as well as the fact that the state legislature intended for state courts to defer to the IRS, the 5th Circuit concluded that the bankruptcy court must defer to the IRS on the issue of determining ERISA-qualification.

Youngblood raises the question of what precedential value it has on this Court. Under the established federal legal system, the decisions of one Circuit are not binding on other Circuits. Circuits are not in agreement as to what extent their own decisions are binding on themselves, i.e., whether a decision of one panel is binding on another panel considering the same issue. In 1981, Congress divided the then-existing Fifth Circuit, which included Alabama, Georgia and Florida, and created the Eleventh Circuit, comprised of these three states. The Act dividing the old Fifth and creating the new Eleventh did not address the issue of whether the previous decisions of the old Fifth Circuit remained binding authority upon the new Eleventh Circuit. The Eleventh Circuit first faced the issue in the case of Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981), in which it held that the decisions of the old Fifth Circuit would be binding as precedent on the Eleventh Circuit District Courts and Bankruptcy Courts. The holding in Bonner was further refined in Stein v. Reynolds Securities, 667 F.2d 33 (11th Cir. 1982), in which the Eleventh Circuit

held that the decisions of the former Fifth Circuit by Unit A of that Court, which included the State of Texas, are not binding precedent in the Eleventh Circuit. Based on the foregoing, this Court is satisfied that Youngblood, decided by the new Fifth Circuit in a case arising from the District Court in Texas (Unit A) has no binding precedential value upon this Court. Thus, this Court is not bound to accept the IRS qualification of a plan under ERISA, and is free to consider whether or not the Plan under consideration is an ERISA-qualified Plan, based upon the manner in which it was operated pursuant to 26 U.S.C. §1056 (d)(1).

IS THE PLAN UNDER CONSIDERATION "ERISA QUALIFIED"?

This Supreme Court in Patterson used the term "ERISA-qualified Plan". In Patterson, it was conceded that the Plan under consideration was ERISA-qualified. The Supreme Court did not specify what elements must be established to determine whether or not a Plan is an ERISA qualified Plan. The term "ERISA-qualified" is not a term of art and is not defined by the Bankruptcy Code, by the Internal Revenue Code, or by ERISA itself. One must, therefore, determine based upon the Statutory scheme of ERISA and the Internal Revenue Code what type of Profit Sharing plans are ERISA-qualified. Post-Patterson cases disagree as to the definition of "ERISA-qualified," and what

is required to qualify a Plan under ERISA. One approach concludes that a plan is ERISA-qualified for purposes of §541(c)(2) if it is (1) governed by ERISA and (2) includes an anti-alienation provision that is (3) enforceable under ERISA. In re Bennett, 1995 Lexis 915. Other courts have enunciated a different approach, holding that a plan must (1) be tax qualified under Internal Revenue Code §401(a), (2) be subject to ERISA, and (3) include an anti-alienation provision.

This Court is inclined to accept the approach which emphasizes the specific elements of qualification under ERISA. A determination of whether a plan is "ERISA-qualified" is necessary before concluding it is excluded from property of the estate. In re Sirois, *supra*; In re Greif, 144 B.R. 206 (Bankr. D. Mass. 1992). This is so because, it cannot be gainsaid that even if the plan is facially ERISA-qualified, it must be operated in full requirement of ERISA and also the Internal Revenue Code. While the Bankruptcy Court is not competent to determine whether or not the ERISA-qualification should be revoked or terminated for non-compliance for purposes of the Internal Revenue Code, it is certainly competent to determine whether or not the Plan under consideration is within the holding of Patterson and excluded from the Debtor's estate by virtue of §541(c)(2). It is beyond peradventure that Profit Sharing plans must be

administered for the exclusive benefit of plan participants and not for the benefit of the owners of the plan or sponsors who are using the plan as a personal bank. It would be incongruous indeed to grant this protective status to a Profit Sharing plan which is administered as a handy cash cow for the owner and the settlor of the plan.

A rudimentary requirement of an ERISA-qualified plan is that "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purpose of providing benefits to participants in the plan. 29 U.S.C. §1103(c)(1) (ERISA §403 (c)(1)). "A "participant" is any employee … who is or may become eligible to receive a benefit from an employee benefit plan…" 29 U.S.C. §1002(7) (ERISA §3(7)). Section 1135 of 29 U.S.C. (ERISA §505) authorizes the Secretary of Labor to promulgate regulations necessary to implement the provisions of ERISA. Pursuant to this authority, the Secretary of Labor clarified the term "employee benefit plan" by providing in 29 C.F.R. §2510.3-3 that an employee benefit plan shall not include any plan under which no employees are participants covered under the plan. The regulation further provides that for the purposes of this section, an individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or the individual

and his or her spouse. In re Hall, 151 B.R. 412 (Bankr. W.D. Mich. 1993).

In the case of In re Witwer, 148 B.R. 930 (Bankr. C.D. Cal. 1992) which is a post-Patterson case, the Court analyzed the term "ERISA-qualified plan." The plan in Witwer was set up by the debtor who was the sole participant and beneficiary of a Profit Sharing plan which was established by his incorporated medical practice. The plan contained the requisite anti-alienation provision and, facially, complied with the anti-alienation requirements of §401(a) of the Internal Revenue Code. The Court, relying on 29 C.F.R. §2510.3-3, held that the Profit Sharing plan was not subject to ERISA because the debtor was not a participant for the simple reason that the regulation clearly disqualified a sole shareholder as an employee. By disqualifying the debtor an employee, the plan then had no participants, and therefore, the plan did not meet the definition of an employee Profit Sharing benefit plan. 29 U.S.C. §1002(2)(A) (ERISA §3(2)(A)).

In a non-bankruptcy context, two Circuits have determined that a plan whose sole beneficiaries were the owners of the company could not qualify as a plan under ERISA. Fugarino v. Hartford Life & Accident Ins. Co., 969 F.2d 178 (6th Cir. 1992); Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262 (9th Cir. 1991). The very same issue was

considered by the Chief District Judge of this District in the case of In re Pruner, 140 B.R. 1 (M.D. Fla. 1992). Judge Moore held that the debtor's plan, in which the debtor was, and always had been, the only participant, was not subject to the provisions and regulations of ERISA. Judge Moore cited the case of Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982), a case which concededly was a pre-Patterson case, but the language is still relevant. In Donovan, the Eleventh Circuit held en banc that, based on the ERISA definitions of "employer" and "employee organization," only if the plan covers ERISA participants based on the employee's status in a relationship of employment may the plan qualify as an ERISA-qualified plan.

In the present instance, the Debtor is the sole shareholder of the professional association. At some time during the administration of the Plan, the Plan had other participants other than the Debtor. However, the Debtor and his wife made frequent loans to themselves. They invested in properties not for the exclusive benefit of any participant, and none of the investments had even a faint resemblance to a prudent investment. There were investments in non-liquid properties made without the benefit of any meaningful investigation or independent appraisals of the properties, and the interests purchased were not freely transferable. Lastly, the Debtor generally failed to manage the Plan assets as an

independent fiduciary charged with the management of other people's money. It is the general failure to administer this Plan in compliance with ERISA and the Internal Revenue Code, and the use of the Plan as a personal bank which justifies the treatment of this Plan as property of the estate.

Having concluded that the Debtor's interest in this Profit Sharing Plan is not excluded from his estate by virtue of §541(c)(2) based on Patterson, this leaves for consideration whether or not the Debtor may exempt his interest in this Profit Sharing Plan pursuant to Fla. Stat. §222.21(2), which provides, in pertinent part:

§222.21. EXEMPTION OF PENSION MONEY AND RETIREMENT OR PROFIT-SHARING BENEFITS FROM LEGAL PROCESS

> (2)(a) Except as provided in paragraph (b), any money, or other assets payable to a participant or beneficiary from, or any interest of any participant or beneficiary in, a retirement or profit sharing plan that is qualified under §401(a), §403(a), §403(b), §408, or §409 of the Internal Revenue Code of 1986, as amended, is exempt from all claim of creditors of the beneficiary or participant.

It is apparent that the exemption under this Statute is limited to monies or assets payable to the participant of retirement plans or profit sharing plans which are qualified

under ERISA and the applicability provision of the Internal Revenue Code having concurred that the plan under consideration (Capital) that the plan is not excluded from the estate of the Debtor by virtue of §541(c)(2), thus could be claimed as exempt provided, however, that it qualifies for exemption under the Florida Statute under consideration. Since it does not, the Debtor cannot rely on this Statute to exempt his interest in the Plan under consideration. As an alternative, the Trustee and Banker's Trust contend that even if the plan is ERISA qualified Fla. Stat. §222.21(2)(a) is invalid because it has been preempted by ERISA.

It should be noted at the outset that the Objectors devoted a great amount in their briefs to urge that the Plan under consideration is not ERISA-qualified Plan, and thus not excluded from the Debtor's estate by virtue of §541(c)(2) and subject to administration unless the Debtor may exempt the interest. Since ERISA-qualification is a condition precedent to the application of the Statute relied on by the Debtor, the exemption under this Statute is not available, having already concluded that the Plan is not an ERISA-qualified Plan.

In light of the foregoing it is unnecessary to consider whether the Statute is pre-empted by ERISA, a proposition challenged by the Trustee, in spite of the controlling law in this Circuit, which holds that the Florida exemption statute

for "employee benefit plans" was not pre-empted by ERISA, and thus was available to Chapter 7 debtors. See, In re Schlein, 8 F.3d 745 (11th Cir. 1993).

This leaves for consideration the claim of exemption based on Fla. Stat. §222.201. Section 522(b)(1) of the Bankruptcy Code authorizes States to opt-out of the federal exemptions set forth in Section 522(d) of the Bankruptcy Code. Florida, with a majority of the States, opted-out of §522, by enacting Fla. Stat. §222.20 prohibiting the citizens of this Florida from claiming as exempt any property listed in Section 522(d) of the Bankruptcy Code.

Notwithstanding, the Legislature enacted Fla. Stat. §222.201 and in fact selectively opted-back to the federal exemptions authorizing the citizens of the State to exempt properties which may be exempted under Section 522(d)(10) which in pertinent part provides:

> **(d)** The following property may be exempted under Subsection (b)(1) of this section:
>
> ...
>
> **(10)** The debtor's right to receive --
>
> ...
>
> **(E)** A payment under a stock bonus, pension, profit sharing, annuity, or similar plan... to the extent reasonably necessary for

> the support of the debtor and any dependent of the debtor, unless - -
>
> ...
>
> **(i)** such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;
>
> ...
>
> **(iii)** such plan or contract does not qualify under section 401(a), 403(a), 403(b), 408, or 409 of the Internal Revenue Code of 1986.

Whether States which opted-out from the federal exemptions may selectively opt-back, like Florida did with the enactment of Fla. Stat. §222.201 is not without doubt. In re Morrow, 122 B.R. 151 (M.D. Fla. 1990); see also Matter of Lee, 119 B.R. 833 (Bankr. M.D. Fla.). This Court has no difficulty in accepting the proposition that there is no constitutional obstacle for Florida to opt-back selectively into the federal bankruptcy exemptions, nor in the Bankruptcy Code. The legislative history of the Code does not indicate an intention by Congress to establish an "all or nothing" policy by providing for the opt-out and indirectly prohibiting the opting-back. However, it is necessary to rule on this question.

A review of the legal requirements of §522(d)(10)(E)

reveals that, regardless of Fla. Stat. §222.201, the Profit Sharing Plan does not qualify as exempt property for two reasons. First, because the Plan was established by and under the auspices of an insider that employed the Debtor, i.e., Howard M. Harris M.D.P.A.; see §522(d)(10)(E)(i). Second, the Plan does not qualify under the applicable provisions of the Internal Revenue Code pursuant to §522(d)(10)(E)(iii). Based upon the foregoing, it is clear that the Debtor's interest in this Profit Sharing Plan cannot be claimed and allowed as exempt property. In light of the foregoing, it is unnecessary to consider whether or not Fla. Stat. 222.20 is or is not constitutional.

Based on the foregoing, this Court is satisfied that there are no genuine issues of material fact and the Trustee and Banker's Trust are entitled to a final judgment in their favor.

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment filed by the Trustee is hereby granted, and a separate final judgment will be entered in accordance with the foregoing. It is further

ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment filed by the Debtor is hereby denied.

DONE AND ORDERED at Tampa, Florida, on September 27, 1995.

/s/ Alexander L. Paskay
ALEXANDER L. PASKAY
Chief Bankruptcy Judge

Copies to:
Debtor(s) Howard Morten Harris, 2298 Dixie Lee Court; Saint James City, FL 33956

Debtor(s) Atty - Jeffrey W. Leasure, Esq.; P.O. Box 06119; Ft. Myers, FL 33906

Movant(s) Atty - Pavese, Garner, et al.; P.O. Drawer 1507, Ft. Myers, FL 33902

Trustee - Diane L. Jensen, Esq., P.O. Drawer 1507, Ft. Myers, FL 33902

Assistant U.S. Trustee - 4919 Memorial Hwy., Ste. 110, Tampa, FL 33634

EXHIBIT "A"

UNCONTESTED FACTS

In re: HOWARD M. HARRIS Case No.:94-07386-9P7

GENERAL FACTS

1. Howard M. Harris, Debtor, filed a Voluntary Petition for protection under Chapter 7 on August 1, 1994.

2. Dr. Harris claimed his interest in the Howard M. Harris M.D.P.A. Profit Sharing Plan, the "Plan", as exempt pursuant to Florida Statutes §§222.201 and 222.21 and 29 U.S.C. §§1056 and 1065.

3. Trustee filed a timely objection to Debtor's claim on exemption on October 21, 1994.

4. The Plan is maintained by Howard M. Harris, M.D.P.A.

5. Dr. Harris is the sole shareholder in Howard M. Harris, M.D.P.A.

6. Prior to May, 1994, Debtor was a co-trustee of the Plan along with his wife, Carol Harris.

7. Since, May 1994, Carol Harris, the Debtor's wife, has been the sole trustee of the Plan.

8. Carol Harris is a former employee of Howard M. Harris, M.D.P.A. and a former participant in the Plan.

9. At all times material hereto the Plan was maintained pursuant to an Adoption Agreement and Prototype Trust

Agreement which had received a favorable Letter of Determination from the Internal Revenue Service.

10. The Letter of Determination issued by the Internal Revenue Service relative to the Prototype Trust Agreement adopted by Howard M. Harris, M.D.P.A. expressly states that it is not a ruling or determination on whether the Howard M. Harris, M.D.P.A. Retirement Plan *per se* qualifies under Internal Revenue Code §401(a) and conditions the qualification of the plan of any employer who adopts the Prototype Trust Agreement on compliance with all provisions of the plan and applicable law.

11. No Letter of Determination has ever been issued or requested with respect to the Howard M. Harris, M.D.P.A. Retirement Plan *per se*.

12. The Plan does not have any records of the Plan having ever been examined or audited for operational compliance with applicable provisions of the Internal Revenue Code.

13. Debtor is the sole shareholder of Howard M. Harris, M.D.P.A.

14. Howard M. Harris, M.D.P.A. ceased doing business in February, 1991.

PLAN INVESTMENTS

15. Substantially all of the Plan assets were invested in raw land in and around Lee County.

16. Substantially all of the Plan assets were invested in land trusts, limited partnerships and other forms of investment which are illiquid and not freely transferable.

17. Dr. Harris has no personal experience in land investments; and in making the Plan's investments in land Dr. Harris did not seek *independent* professional advice.

18. Substantially all of the investments made by the Plan cause the Plan to incur continuing liabilities for the payment of debts incurred in connection with the purchase of the underlying property and/or payment of maintenance and operating expenses. [Financial Statements; Depo. P-42].

19. When the Plan had insufficient liquidity to satisfy its continuing obligations for payments on debts incurred in connection with the Plan's investment, the Plan periodically borrowed additional funds and pledged Plan assets as security for such loans.

20. In valuing Plan assets for purposes of determining the value of participant accounts, the Plan did not obtain property appraisals but, rather, merely "call[ed] different realtors and ask them what they felt they were worth." Distributions made to former Plan participants were made based on account balances determined by these "guesstimates" of the value of the Plan investments. No records were kept of these "appraisals".

21. The plan does not have any written appraisals or other documentation of the valuation of Plan assets used in computing the balances of participants accounts for purposes of making distributions to Plan participants.

22. In 1991, the Plan purchased a diamond ring from one of Debtor's family members whose betrothed had given it back to him.

23. Debtor asserts that the diamond ring was kept in a safe deposit box [Depo. P-45] but is unable to provide proof of the rental of a safe deposit box by the Plan.

24. Debtor alleges that the diamond ring was sold but has no documentation to establish that the ring was old or the amount for which the ring was sold.

25. Although the Plan authorizes the purchase of life insurance on the lives of Plan participants, life insurance was only ever purchased on the lives of Dr. Harris and Carol Harris.

PLAN LOANS

26. Pursuant to the provisions of the Internal Revenue Code §417, the Plan requires the consent of a participant's spouse for loans and other withdrawals or distributions taken in any form other than a distribution of a participant's account balance in the form of a Qualified Joint and Survivor Annuity, QJSA. Both the Plan and Internal Revenue Code §417(a)(2) require such spousal consents to be either notarized or witnessed by the plan representative.

27. Between 1986 and 1990, Dr. Harris took 17 Plan loans totaling more that $125,000 pursuant to instruments which were neither notarized nor witnessed by the plan representative.

28. Dr. Harris borrowed funds from the Plan without attempting to obtain loans from commercial lending sources.

29. Dr. Harris is an owner-employee as defined by §14.14(d) of the Plan Trust Agreement.

30. Section 14.13(c) of the Plan Trust Agreement which has been in effect since May 1, 1990 provides that no loans may be made to an owner-employee. Notwithstanding this prohibition against loans to owner-employees.

a. In 1990, Dr. Harris borrowed funds totaling

$41,000 from the Plan. (1)(2)

b. In 1991, Debtor borrowed funds totaling $31,000 from the Plan.(3)

(1) One of the loans taken in 1990, a loan for $11,000 taken on June 22, 1990, was applied for and received on the same day Carol Harris closed on the purchase of a condo (discussed *infra*) and was required to make a cash payment of $15,505.92.

(2) In addition to $41,000 in documented loans, in April, 1991, Dr. Harris took undocumented advances totaling $31,000. Thus, although ¶14.13(b) of the Plan limits aggregate loans to $50,000, for much of 1991, Dr. Harris had outstanding loans of $72,000.

(3) At his deposition, Dr. Harris denied taking any loans from the Plan since 1990. [Depo P-71] However, records provided after the deposition show documentation for six loans taken in 1991.

31. In 1990, when Dr. Harris borrowed $41,000 from the Plan, Dr. Harris has reported income from wages of $389,169.

32. Substantially, all of the cash accumulated in the Plan during 1990 and 1991 was removed from the Plan as loans to Howard Harris.

33. Debtor has not made any payments to the Plan on

account of the loans taken in 1990 and 1991 since June 14, 1991.

34. Between June 14, 1991 and December, 1991, during which Dr. Harris was in default on all prior loans, the Plan made five additional loans to Dr. Harris totaling approximately $27,000.

35. At the end of 1991, the outstanding balances of Dr. Harris's loans, with accrued interest, were eliminated by a "deemed distribution" in the amount of the outstanding loan balances. Accrued interest on the outstanding loans was reported as a Plan asset.

36. The Plan limits the aggregate total outstanding loans to any participant to $50,000.

37. The outstanding balance of all loans taken by Howard Harris from his Retirement Plan through 1991 exceeds the maximum total loans permitted by the provisions of Internal Revenue Code §72(p) and the express provisions of the Retirement Plan.

38. The Plan has not taken any action to enforce the Promissory Notes executed by Debtor with respect to outstanding loans to Debtor.

39. Only Dr. Harris was ever given a loan from the Plan.

PLAN DISTRIBUTIONS - GENERAL

40. When Howard M. Harris, M.D.P.A. ceased doing business it had approximately six employees, four of whom had vested benefits in the Plan.

41. The vested accounts of participants in the Plan were not distributed to them until 1993 because the Plan did not

have sufficient liquidity to pay distributions.

42. The principle reason that the Plan lacked sufficient liquidity to make timely distributions to plan participants was that Howard Harris had borrowed all the liquid funds from the plan in 1991 and 1992 and made distributions to himself in 1991 and 1992.

43. Following the 1993 distributions to Plan participants, only one participant other than the Debtor remained as a participant in the Plan. That participant's interest in the plan was segregated in a separate bank account without the participant's consent.

44. For purposes of determining participant account balances, plan assets were valued significantly lower than they were valued on Plan financial statements. E.g.

	Financial Statement	Participant Account
06/30/89	533,733.66	416,899.09
06/30/90	not provided	not provided
06/30/91	615,943.72	509,590.21
06/30/92	553,438.22	484,144.44

45. For purposes of determining participant account balances, the case value of life insurance purchased on the lives of plan participants was not included as a plan asset.

PLAN DISTRIBUTIONS - HOWARD HARRIS

46. In addition to loans taken from the plan Debtor has received a distribution from his Profit Sharing Plan as follows:

1991	$59,001
1992	$59,342

47. In April, 1991, Dr. Harris took distributions from the plan totaling $31,000 ($10,000 on April 4, 1991 and $21,000 on April 14, 1991) without any contemporaneous documentation whatsoever. On December 9, 1991, Dr. Harris attempted to "document" these distributions by executing distribution requests and releases.

48. November, 1992, the Plan made payments to attorneys for Dr. Harris's estate planning. On September 23, 1993, Dr. Harris attempted to justify this distribution by documenting it as a "distribution" to Dr. Harris.

PLAN DISTRIBUTIONS - CAROL HARRIS

49. Carol Harris terminated her employment with Howard M. Harris, M.D.P.A. in 1989.

50. At the time of her termination, Carol Harris was 100% vested
in her account in the plan which had a balance of $68,368.

51. Carol Harris's stated account balance in 1989 did not include the cash value of life insurance purchased on her life.

52. On December 27, 1989, Carol Harris made an to receive a distribution from the Plan.

53. Prior to making her election to receive a distribution from the Plan Carol Harris has received distributions as follows:

October 12, 1989	$9,831.59
October 15, 1991	$22,839.75(*)
December 12, 1991	$9,000.00
December 26, 1991	$26,705.91

(*) Credited as down payment on condo in which the Plan

had an interest prior to sale to Carol Harris. The unit which Carol Harris purchased was built with money from the Plan.

54. On December 13, 1988, the Plan had been amended to prohibit lump-sum distributions to plan participants. The amendment became effective January 1, 1989 and was in effect at the time Carol Harris received her distributions from the Plan.

55. Carol Harris received an additional Plan distribution of approximately $5,594.44 in 1992 when the Plan owned policy of life insurance on her life was cashed in.

56. In 1989, Carol Harris purchased a condo unit in which the Plan has an interest for$152.830. Carol Harris made a "deemed" down payment of $22,839.75 which was charged against her account in the Plan (even though she had not yet requested a distribution from the Plan).

57. The amount which was deemed to have been a distribution to Carol Harris as the Plan's interest in the condo was based on, and was the same as, the Plan's investment in the condo. The value of the Plan's interest in the condo was never independently appraised prior to the distribution of the Plan's interest to Carol Harris.

58. At approximately the time Carol Harris acquired the Plan's interest in the condo, which was ostensible purchased for $152,830, the condo had an appraised value of at least $190,730 which was the reported sales price used when Carol Harris obtained a purchase loan of $152,500 on June 22, 1990.

59. Since approximately June, 1990, Debtor and his wife have resided in the unit distributed from the Plan to Carol Harris.

Supreme Court, U.S.
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No. 97-390

In The Supreme Court Of The United States

OCTOBER TERM, 1997

HOWARD MORTON HARRIS,
Petitioner

v.

DIANE L. JENSEN
and
BANKERS TRUST COMPANY,
Respondents

Petition for Writ Of Certiori to the
Unites States Court of Appeals
for the Eleventh Circuit

BRIEF IN OPPOSITION

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13 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	1
STATEMENT OF THE CASE AND CORRECTION OF MISREPRESENTATIONS	2
REASONS FOR DENYING THE PETITION	5
Eleventh Circuit Decision Does Not Create A Conflict Between The Circuits	5
Decisions Below Are Supported On Grounds Not Opposed In Bankruptcy Court Proceedings	9
CONCLUSION	10

TABLE OF AUTHORITIES

	Page
FEDERAL CASES:	
Guidry v. Sheet Metal Workers National Pension Fund, 493 U.S. 365 (1990)	7, 8
In Re: Baker, 114 F.3d 636 (7th Cir. 1997)	5, 7
In Re: Harris, 188 B.R. 444 (Bankr. M.D. Fla. 1995)	1
Patterson v. Shumate, 504 U.S. 753 (1992)	*passim*
Singleton v. Wulff, 428 U.S. 1202 (1976)	9
FEDERAL REGULATIONS	
29 C.F.R. § 2510.3-3	8
ELEVENTH CIRCUIT LOCAL RULES	
Rule 36-1	5
Rule 36-2	5, 6

OPINIONS BELOW

Petitioner seeks review of the Eleventh Circuit decision affirming the decision of the District Court for the Middle District of Florida affirming the opinion of summary judgment of the Bankruptcy Court for the Middle District of Florida, *In Re: Harris*, 188 B.R. 444 (Bankr. M.D. Fla. 1995). These opinions are reprinted in Petitioner's Appendix at pages A1-A36. (For the convenience of the Court, all citations to these opinions will be to the opinions attached as the Appendix to the petition.)

STATEMENT OF THE CASE AND CORRECTION OF MISREPRESENTATIONS

The Eleventh Circuit affirmed, without opinion, the decision of the United States District Court for the Middle District of Florida which had, in turn, affirmed the decision of the Bankrupt Court for the Middle District of Florida in which the Court had held that Petitioner's interest in his profit sharing plan, herein "plan", was not exempt as an "ERISA-qualified" plan under the standard enunciated in *Patterson v. Shumate*, 504 U.S. 753 (1992). Petitioner asserts that these decisions held that:

> "the *Patterson* protection for pension benefits is only available if the pension plan from which the benefits are paid has always been administered in *complete compliance* with Title I of ERISA, 29 U.S.C. §§ 1001-1194, and the Internal Revenue Code." [Petitioner's Brief, page 3 (*Emphasis added*)].

This is not, however, an accurate statement of what the Eleventh Circuit, the District Court or the Bankruptcy Court held[1].

The decision of Eleventh Circuit [Petitioner's Brief Appendix A, A1-2] was entered without an opinion. Therefore, the Eleventh Circuit clearly did not hold as the Petitioner represents. Similarly, the District Court affirmed the decision of the Bankruptcy Court in its entirety without addressing the legal issues presented in the Bankruptcy Court's opinion. [Petitioner's Brief Appendix A, A3-4][2]. Therefore, it is incorrect to say that the District Court held as Petitioner contends. To determine what the Eleventh Circuit was ultimately affirming in its "Affirmed, *Per Curium*" decision it is necessary to go all the way back to the decision of the Bankruptcy Court. [Petitioner's Brief Appendix A, A2-27]

The Bankruptcy Court found two separate grounds for holding that the Petitioner's plan was not "ERISA-qualified" within the meaning of *Patterson v. Shumate*: -

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[1] In Petitioner's statement of the "QUESTION PRESENTED", Petitioner similarly mischaracterizes the decisions below when he attempts to read an "*absolute compliance*" standard into their opinions when no such standard was ever expressed or even implied.

[2] Although the District Court did express particular agreement with a provision of the Bankruptcy Court's opinion relating to the scope of the Bankruptcy Court's powers, the District Court affirmed the decision of the Bankruptcy Court in its entirety without basing its affirmation on any particular proposition.

> First, the Bankruptcy Court recognized that the because Petitioner was the sole shareholder of the plan sponsor the plan was not subject to ERISA as to the Petitioner. [Petitioner's Appendix A, A20-21]
>
> Second, the Bankruptcy Court held that "[w]hile the Bankruptcy Court is not competent to determine whether or not the ERISA-qualification should be revoked or terminated for non-compliance for purposes of the Internal Revenue Code, it is certainly competent to determine whether or not the Plan under consideration is within the holding of *Patterson* and excluded from the Debtor's estate by virtue of [11 U.S.C.] § 541(c)(2)." [Petitioner's Appendix A, A18]

In reaching these conclusions, the Bankruptcy Court specifically stated that:

> In *Patterson v. Shumate* "[t]he Supreme Court did not specify what elements must be established to determine whether or not a Plan is an ERISA-qualified Plan. The term 'ERISA-qualified' is not a term of art and is not defined by the Bankruptcy Code, by the Internal Revenue Code, or by ERISA itself. One must, therefore, determine, based upon the statutory scheme of ERISA and the Internal Revenue Code what type of Profit Sharing plans are ERISA-qualified." [Petitioner's Appendix A, A17]

The Bankruptcy Court then examined the alternative

interpretations of the term "ERISA-qualified" and concluded that it was intended to connotate a plan which includes an anti-alienation provision and (1) is subject to ERISA and (2) is tax qualified under Internal Revenue Code § 401(a). [Petitioner's Appendix A, A18] An discussed *supra*, the Bankruptcy Court addressed *both* the ERISA and the IRC "prongs" of the "ERISA-qualified" test and found that the Petitioner's plan failed *each* prong -- e.g. Petitioner's plan was not subject to ERISA and it was not tax qualified.

Throughout the appeal of this case Petitioner has attempted to create an "straw man" by mischaracterizing the Bankruptcy Court's decision as requiring "complete compliance" with the requirements of ERISA and the Internal Revenue Code. To the contrary, neither the Eleventh Circuit, the District Court or the Bankruptcy Court imposed a "complete compliance" requirement on the "ERISA-qualified" test of *Patterson v. Shumate*. Nonetheless, based on this straw man, Petitioner has argued that because Petitioner *might* have availed himself of remedial procedures established by the Internal Revenue Service to correct the plan's excessive operational violations -- the presence of which the Petitioner has never disputed, the Internal Revenue Service would not necessarily have been disqualified by the Internal Revenue Service. In making these arguments Petitioner has focussed entirely on "qualified" portion of the "ERISA-qualified" test of *Patterson v. Shumate*, and wholly ignored the fact that the Bankruptcy Court's ruling also reflected the fact that the *Petitioner's plan was not subject to ERISA* as to the Petitioner.

Petitioner also contends that the decisions of the

Eleventh Circuit, the District Court and the Bankruptcy Court were based on a finding that the Petitioner's plan failed to comply with all of the operational requirements of ERISA. Although this argument is necessary to create an apparent conflict with the Seventh Circuit's decision in *In Re: Baker*, 114 F.3d 636 (7th Cir. 1997), it is not a correct statement of the controlling factors in the Bankruptcy Court decision. The Bankruptcy Court recognized that the Petitioner's plan was *not subject to ERISA* as to the Petitioner. Therefore, any discussion of the Petitioner's failure to comply with the requirements of ERISA was mere *dicta*.

REASONS FOR DENYING THE PETITION

I.

Eleventh Circuit Decision Does Not Create A Conflict Among The Circuits

As the basis for this Court's jurisdiction, Petitioner relies on the proposition that the Eleventh Circuit's decision creates a conflict among the Circuits. This assertion is without merit.

The Eleventh Circuit's decision, "Affirmed, *Per Curium*", was entered under the Eleventh Circuit's Local Rule 36-1 which is reserved for "an opinion [which] would have no precedential value"[3]. Furthermore, the

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[3] Eleventh Circuit Rule 36-1 provides in relevent part that: "When the court determines that ... (d) a summary judgment, directed verdict or judgment on the pleadings is supported by the record ... *and an opinion would have no precedential value*, the judgment or order may be affirmed

Eleventh Circuit's opinion is unpublished and, pursuant to Local Rule 36-2, unpublished opinions are not considered binding precedent[4]. In as much as the Eleventh Circuit's decision is not even binding precedent within the Eleventh Circuit, it cannot be said that there is a conflict between the Eleventh Circuit and any other Circuit.

Furthermore, even if the Eleventh Circuit's "Affirmed, *Per Curium*", decision were deemed to constitute Eleventh Circuit precedent, there is no basis for finding that a conflict exists with respect to the decision of any other Circuit because the Eleventh Circuit did not state the grounds on which its decision was based. As discussed *infra*, the Bankruptcy Court gave *two separate grounds* for its decision, e.g. first, that the Petitioner's plan was not subject to ERISA, and second, that the Petitioner's willful and egregious misuse and of plan assets in total disregard of the requirements of the Internal Revenue Code caused the plan to fail the "qualified" prong of the "ERISA-qualified" test. Petitioner bases his entire argument on the self-serving conclusion that the Eleventh Circuit's decision was based solely on a finding that Petitioner's plan was not maintained in full compliance with the requirements of

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without an opinion." (*Emphasis added*)

[4] Eleventh Circuit Rule 36-2 provides: "Unpublished Opinion: An opinion shall be unpublished unless a majority of the panel decides to publish it. *Unpublished opinions are not considered binding precedent.* They may be cited as persuasive authority provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition, motion or response in which such citation is made." (*Emphasis added*)

ERISA and the Internal Revenue Code. There is, however, no evidence that this was the basis for the Eleventh Circuit's decision. To the contrary, it is just as reasonable to conclude that the Eleventh Circuit ignored the entire issue of the plan's tax qualification and affirmed the decisions of the Bankruptcy Court and District Court solely on the grounds that the plan was not even subject to ERISA. If this was the basis for the Eleventh Circuit's decision, there would be no conflict between the Eleventh Circuit and any of the authorities relied on by Petitioner. In as much as the Eleventh Circuit chose not to write an opinion in support of its decision, the grounds on which its decision was based will never be known. Under these circumstances it cannot be said that there is a conflict between the decision of the Eleventh Circuit and the decisions of any other Circuit.

Petitioner places particular reliance on a purported conflict between the Eleventh Circuit's decision and *In Re: Baker, supra,* in which the Seventh Circuit's held that failure to administer a plan in full conformity with ERISA does not make ERISA inapplicable. *If* the Bankruptcy Court, the District Court or the Eleventh Circuit had based their holdings solely on failure to comply with the requirements of ERISA, Petitioner's argument might be given credence. However, the decision of the Bankruptcy Court, as affirmed by the District Court and the Eleventh Circuit, was that *the plan was not even subject to ERISA*. Petitioner's attempt to recharacterize the original holding of the Bankruptcy Court solely for the purpose of creating an artificial conflict with the Seventh Circuit must be disregarded.

Finally, Petitioner argues that the Eleventh Circuit's decision is in conflict with this Court's decision in *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365 (1990) in which this Court found that there was no equitable exception to ERISA's anti-alienation provision. In enunciating the "ERISA-qualified" test of *Patterson*, this Court clearly established a threshhold test for determining whether interests in retirement plan can be protected in bankruptcy. That is, even under *Patterson*, if a plan is not "ERISA-qualified" a debtor's interest in a plan can be an asset of the bankruptcy estate. If, as Petitioner appears to contend, *Guidry* is violated *any time* an interest in a retirement plan is found to be property of a bankruptcy estate, the "ERISA-qualified" standard of *Patterson* would have no significance. This conflict does not exist because an interest in a plan which is not subject to ERISA is not within the scope of *Guidry* and becomes an asset of the bankruptcy estate by virtue of failing the "ERISA-qualified" requirement of *Patterson v. Shumate*.

In this case, the Bankruptcy Court recognized, and the District Court and the Eleventh Circuit agreed, that the Petitioner's plan was not even subject to ERISA. Therefore, there is no conflict between the Eleventh Circuit's decision and *Guidry* because *Guidry* only applies to plans that are subject to ERISA and the Bankruptcy Court, the District Court and the Eleventh Circuit all found that Petitioner's plan is not subject to ERISA.

II.

Decisions Below Are Supported On Grounds Not Opposed In Bankruptcy Court Proceedings

In the proceedings in the Bankruptcy Court the Respondents argued that Petitioner's plan was not subject to ERISA and, therefore, could not be "ERISA-qualified" because the Petitioner was the sole shareholder of the plan sponsor. The Bankruptcy Court found that because 29 C.F.R. § 2510.3-3 disqualifies a sole shareholder from status as an employee or plan participant, and, therefore, the plan was not subject to ERISA as to the Petitioner. *Petitioner did not contest this argument in the proceedings in the Bankruptcy Court.* In Petitioner's appeal to the District Court Petitioner argued, *for the first time*, that a plan could be subject to ERISA even as to a sole shareholder. However, it is well established that a federal appellate court will not generally consider an issue not passed on below. *Singleton v. Wulff*, 428 U.S. 1202, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976). Therefore, the District Court, sitting as an appellate court with respect to the decision of the Bankruptcy Court, was not required to consider any argument in opposition to the Bankruptcy Court's holding that the plan was not subject to ERISA.

In as much as the decision of the Bankruptcy Court, as affirmed by the District Court and the Eleventh Circuit, was based on adequate grounds apart from those argued by Petitioner as the basis for a review by this Court, any ruling by this Court on the issues raised by Petitioner would be moot and of no significance because the decisions below are adequately supported on grounds which the Petitioner did not

dispute in Bankruptcy Court. Therefore, any decision by this Court would be merely an advisory opinion.

CONCLUSION

Because the decisions of the Bankruptcy Court, as affirmed by the District Court and the Eleventh Circuit, could be properly affirmed on grounds other than the grounds on which Petitioner bases his assertion of a conflict among the Circuits, and because the decision of the Eleventh Circuit -- which does not even constitute precedent within the Eleventh Circuit -- does not clearly conflict with any other decision, review by the Supreme Court is unwarranted and Respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted.

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